

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
The State of Minnesota Petition for) CC Docket No. 98-1
Declaratory Ruling Concerning Access to)
Freeway Rights-of-Way Under Section 253)
of the Telecommunications Act)
_____)

**REPLY COMMENTS OF THE UNITED STATES TELEPHONE
ASSOCIATION, THE ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS
COMPANIES, THE WESTERN RURAL TELEPHONE
ASSOCIATION AND THE COMPETITION POLICY INSTITUTE**

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SUMMARY

USTA, OPASTCO, WRTA and CPI hereby submit their reply comments in this proceeding. In their reply comments, the Telephone Trade Associations and CPI make three points: 1) that Minnesota's motivation for entering into the Agreement was to barter exclusive access to freeway rights-of-way in exchange for fiber optic network capacity; 2) that the record demonstrates that alternative routes are cost prohibitive; and 3) that Minnesota's planned action creates a barrier to investment in advanced telecommunications networks.

For the reasons set forth in their comments and these reply comments, as supported by the record in this proceeding, the Telephone Trade Associations and CPI renew their request that the Commission deny the Petition and preempt Minnesota from proceeding under the Agreement.

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COMPANIES, THE WESTERN RURAL TELEPHONE
ASSOCIATION AND THE COMPETITION POLICY INSTITUTE**

The United States Telephone Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Western Rural Telephone Association (collectively "Telephone Trade Associations") and the Competition Policy Institute (CPI), through the undersigned, hereby reply to the comments and oppositions filed in this proceeding concerning the Petition for Declaratory Ruling of the State of Minnesota (Petition). The Telephone Trade Associations and CPI filed an Opposition and Request to Preempt herein.¹

¹ See Opposition and Request to Preempt of the United States Telephone Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Western Rural Telephone Association and the Competition Policy Institute, filed on March 9, 1998 (Opposition).

The Telephone Trade Associations and CPI reassert that Minnesota's plan² to grant to its Developer exclusive access to freeway rights-of-way throughout the state, in exchange for 20%-30% of the capacity of the fiber optic network that the Developer is to construct in those rights-of-way, violates subsection 253(a) of the Communications Act.³ Because the plan is not necessary in order to address public safety concerns and is discriminatory and anticompetitive, it is not a valid exercise of the authority reserved to states under subsections 253(b) and (c) of the Communications Act.⁴ Accordingly, the Federal Communications Commission (Commission) must deny Minnesota's Petition and preempt its planned action pursuant to subsection 253(d) of the Communications Act.⁵

DISCUSSION

The filings made in response to the Petition fall into two distinct groups -- letters from states⁶ offering support for the Petition and pleadings from carriers and organizations requesting

² Minnesota's plan is described in the Agreement to Develop and Operate Communications Facilities, dated December 23, 1997, by and among the State of Minnesota, Acting by and through the Commissioner of the Department of Transportation and the Commissioner of the Department of Administration and Stone & Webster Engineering Corporation, a Massachusetts Corporation (Agreement), a copy of which has been filed in this proceeding by Minnesota.

³ Communications Act of 1934, 47 U.S.C. § 151 et seq., § 253(a).

⁴ 47 U.S.C. §§ 253(b) and (c).

⁵ 47 U.S.C. § 253(d).

⁶ The following states filed letters in support of the Petition through various departments and divisions: Alabama, Arizona, California, Delaware, Florida, Indiana, Kansas, Maine,

that the Commission deny the Petition, and in some cases, that it preempt Minnesota from proceeding under the Agreement. The letters from the states do not analyze the terms of the Agreement in the context of Section 253 and simply conclude that Minnesota's plan to grant exclusive access to freeway rights-of-way to its Developer is a reasonable response to public safety concerns and is consistent with Section 253. The filings from the carriers and organizations analyze Section 253 as interpreted in prior Commission decisions and are virtually unanimous in the conclusion that Minnesota's exclusive grant violates subsection 253(a), is not saved by subsections 253(b) or (c), and must be preempted by the Commission pursuant to subsection 253(d).

A number of the filings that oppose the Petition and ask for preemption persuasively demonstrate that Minnesota's plan is a transparent attempt to trade rights-of-way access for a fiber optic telecommunications network at the expense of telecommunications services providers. The Telephone Trade Associations and CPI will not restate the arguments presented in the oppositions and comments. Rather, they wish to underscore several of the factual submissions made by the Minnesota Telephone Association and MFS Network Technologies, Inc. which demonstrate that Minnesota was not motivated by public safety concerns in moving forward to secure the Agreement and that the exclusive grant makes competition with the Developer cost prohibitive. Additionally, the Telephone Trade Associations and CPI believe that if Minnesota is permitted to proceed under the Agreement, its action will create a barrier to infrastructure

Massachusetts, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin.

development in contravention to its obligations under Section 706 of the Communications Act to encourage the deployment of advanced telecommunications capability to all Americans.⁷

I. The Record Demonstrates That The Impetus For The Agreement Was Minnesota's Desire To Barter Exclusive Access To Freeway Rights-Of-Way In Exchange For Fiber Optic Network Capacity

The Minnesota Telephone Association has opposed the Petition.⁸ Attached as Exhibit 1 to the MTA Opposition is Minnesota's Request For Proposal (RFP), dated February 20, 1996, to which the Developer responded. At page 1 of the RFP, Minnesota states that its goal was to:

develop a public-private partnership venture with communications infrastructure providers and operators to exclusively enter, install and develop communications primarily within state freeway right[s] of way, in exchange for providing operational communications capacity to the state.

Also at page 1 of the RFP, Minnesota identifies its objectives:

- a) Construct and maintain a communications network for as much of the area of the state as possible.
- b) Provide Mn/DOT [Minnesota Department of Transportation] with communications capacity for the future.
- c) Provide communications access to other government entity locations throughout the state.
- d) Provide the successful bidder exclusive rights to Mn/DOT freeway right[s] of way for commercial communication infrastructure purposes.

The RFP continues in the Overview section by stating that "Mn/DOT wishes to barter exclusive rights to freeway right[s] of way in exchange for capacity to satisfy immediate and future state

⁷ 47 U.S.C. § 706.

⁸ See Opposition of Minnesota Telephone Association to Request for Declaratory Judgment, Request of Minnesota Telephone Association for Preemption, filed March 9, 1998 (MTA Opposition).

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needs.”⁹ Later in that section, it states that freeway “rights of way use for utilities has been restrictive in the past.” “Mn/DOT is now permitting exclusive access to its right[s] of way as the incentive to private industry.”¹⁰

The RFP does not identify public safety among its goals and objectives. The reason is because public safety was not the motivating factor for offering exclusive access. The motivating factor was to provide an incentive for a private sector entity to build Minnesota a state of the art fiber optic network.

MFS Network Technologies, Inc. filed comments concerning the Petition.¹¹ The history of access to freeway rights-of-way by utilities in Minnesota is documented at pages 16-20 of the MFS Comments. MFS demonstrates that at both the federal and state levels (including in Minnesota) policies have been put in place that address issues of public safety while at the same time accommodating utilities in freeway rights-of-way.¹² MFS also points out that the single service provider access policy reflected in the Agreement “is not supported by any of the policies adopted by the FHWA [Federal Highway Administration] or the official standard setting body, AASHTO [American Association of State Highway and Transportation Officials], nor

⁹ RFP at p. 1.

¹⁰ *Id.* at p. 2.

¹¹ *See* Comments of MFS Network Technologies, Inc. on the Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-way, filed March 9, 1998 (MFS Comments).

¹² *Id.* at pp. 17, 18.

Minnesota's own Utility Accommodation Policy or rules, e.g., Minn. Rules, Part 8810, et seq."¹³

The oppositions and comments filed in this proceeding demonstrate that it is not necessary to provide exclusive access to freeway rights-of-way to a single service provider in order to address legitimate public safety concerns. Minnesota, through the Agreement and the RFP, has made it exceedingly clear that its motivation from the beginning was to barter exclusive access to public freeway rights-of-way in exchange for a fiber optic network.

II. Alternative Routes In Competition With The Developer Are Cost Prohibitive

Minnesota's Agreement will have the effect of prohibiting the provision of competing telecommunications services. Although Minnesota contends that there are adequate alternatives to the freeway rights-of-way, the record demonstrates that the suggested alternatives are cost prohibitive in light of the preferential position maintained by the Developer. An affidavit from Kenneth D. Knuth is attached to the MTA Opposition as Exhibit 4. Mr. Knuth compares the costs associated with placing facilities along the freeway rights-of-way with those associated with placing facilities along state trunk highway rights-of-way. He demonstrates that the costs can be as much as 70% higher when using the state trunk highway rights-of-way.¹⁴ Mr. Knuth also shows that railroad rights-of-way and pipeline rights-of-way are not viable alternatives to freeway rights-of-way for telecommunications services providers.¹⁵

¹³ Id. at p. 18.

¹⁴ Affidavit of Kenneth D. Knuth at ¶¶ 3-11.

¹⁵ Id. at ¶¶ 12, 13.

Exhibit A to the MFS Comments is the affidavit of Robert Eide. Mr. Eide addresses, among other things, the issue of using other rights-of-way as alternatives to using freeway rights-of-way for the placement of telecommunications facilities. Mr. Eide concludes that the Agreement will provide the Developer with “a significant competitive advantage because there are distinct cost advantages of constructing a telecommunications network over freeway rights-of-way in Minnesota, as opposed to using other rights-of-way [state trunk highway rights-of-way, railroad rights-of-way, pipeline rights-of-way] that are purportedly available to competitors.”¹⁶

III. Section 706 Of The Communications Acts Creates An Affirmative Obligation On The Part Of Minnesota And The Commission To Encourage Rather Than Impede Infrastructure Development

Although the focus of the oppositions and comments filed in response to the Petition has been on the question of whether the Agreement violates Section 253 of the Communications Act, Section 253 is not the only section of the Act implicated by the Agreement. Section 706 of the Act requires that the Commission and each state public service commission having authority over telecommunications services encourage the deployment of advanced telecommunications capability to all Americans.¹⁷ The Commission and each state commission have an affirmative obligation to encourage the deployment of advanced telecommunications capability by, among other things, utilizing their regulatory authority to remove barriers to infrastructure investment.¹⁸

¹⁶ Affidavit of Robert Eide at ¶ 7.

¹⁷ 47 U.S.C. § 706(a).

¹⁸ Id.

If permitted to proceed under the Agreement, Minnesota's grant of exclusive access to freeway rights-of-way to the Developer will serve as a barrier to infrastructure development. No additional fiber optic networks will be constructed in the freeway rights-of-way for the foreseeable future. Further, as the record demonstrates, the cost prohibitive nature of using "alternative rights-of-way" will effectively prohibit telecommunications services providers from constructing advanced telecommunications networks along other routes as long as the Developer maintains its preferential position.

CONCLUSION

The Commission must act decisively in this proceeding. The Commission's decision here will have far reaching impacts. The number of states that have filed in support of Minnesota (at least 24) evidences the national significance of Minnesota's planned action. The issue presented by Minnesota's Petition does not concern public safety. The record demonstrates that public safety can be protected without granting exclusive rights-of-way access to a single developer as provided for in the Agreement. This matter is about the ability of states, as stewards of public rights-of-way, to barter public rights-of-way assets in exchange for free or substantially discounted services for state units and subdivisions, while at the same time stifling infrastructure investment and preventing telecommunications services providers from providing telecommunications services. The Commission should declare that it will not sanction the

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erection of barriers to the provision of telecommunications services or to infrastructure investment. It should deny the Petition and preempt Minnesota from proceeding under the Agreement.

Respectfully submitted,

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April 9, 1998

CERTIFICATE OF SERVICE

I, Carl McFadgion, do certify that on April 9, 1998 copies of the Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.

A handwritten signature in black ink, appearing to read 'Carl McFadgion', written over a horizontal line.

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